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Issue Date: 28 February 2020

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER FOR FURTHER STATUS REPORT

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, (“EO 11246”) and associated regulations at 41 C.F.R. Chapter 60. It involves Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) and Defendant Oracle America, Inc. (“Oracle”). Hearing was held between December 5, 2019, and December 17, 2019. Presently there are seven motions to seal pending related to various pre-hearing filings and the hearing exhibits.

Due to the growing number of motions to seal and disputes about the confidentiality of hearing exhibits, I issued a December 4, 2019, Order Regarding Motions to Seal and Hearing Confidentiality. In regards to the hearing exhibits, the parties were ordered to further meet and confer and file a status update on December 20, 2019, delineating the exhibits they agreed were public, those they agreed to seal in full or part, and those that were still in dispute. The parties were then ordered to meet and confer in person to review all documents in this last category and attempt to reach further agreement. The parties were directed to file another joint status update on January 13, 2020, identifying, from among those in dispute as of December 20, 2019, those that they had agreed were public, those that they agreed to seal in full or part, and those still in dispute. The order then set out a briefing schedule for an omnibus motion to seal.

On December 20, 2019, the parties filed a Joint Status Report Re Hearing Exhibits. As directed, they designated the exhibits that they agreed should not be sealed, those that they agreed should be sealed in full or in part, and those that were still subject to dispute. OFCCP also asked for modifications to the briefing schedule, which was granted on January 7, 2020. Under the new schedule, the parties filed another Joint Status Report Re Confidentiality of Hearing Exhibits on January 17, 2020. They set out, from among the disputed exhibits in the December 20, 2019, status report, those that they now agreed to full release, those they agreed to seal in full or part, and those

still subject to dispute. They also asked for an extension on the briefing schedule since they believed further meet and confers would produce additional agreement.

On January 21, 2020, I granted this request and ordered the parties to file a further joint status report by February 5, 2020. On February 5, 2020, the parties filed a Joint Status Report Re Confidentiality of Hearing Exhibits reporting that they had reached agreement on the confidentiality of all hearing exhibits and listing those they agreed could be disclosed and those they agreed should be sealed in full or part. Oracle filed an Omnibus Motion to Seal Hearing Exhibits on February 6, 2020, with a corrected appendix on February 7, 2020.

After reviewing these filings, I have determined that the parties omitted to address the status of 25 of the exhibits submitted at hearing. These exhibits are as follows:

- Joint Exhibits: JX 40; JX 102; JX 162; JX 164.
- Plaintiff's Exhibits: PX 3; PX 4; PX 5; PX 6; PX 7; PX 11; PX 23; PX 73; PX 192; PX 263; PX 271; PX 436; PX 513; PX 514.
- Defendant's Exhibits: DX 95; DX 210, DX 335; DX 342; DX 441; DX 446; DX 450.

Oracle's motion to seal addresses some of these exhibits (e.g. JX 164 and DX 335) but not others (e.g. PX 6 and DX 342). It is not evident whether the absence of exhibits from the motion to seal indicates that the parties have agreed that the exhibit contains no confidential information, or if it is an indication that the exhibit was forgotten in the process, which involved over 1,100 exhibits.

It does appear that in the process of meeting and conferring, a number of these 25 exhibits simply were inadvertently ignored or omitted from the status updates. While most of these exhibits were never listed in any category on any of the status reports, three appeared on the December 20, 2019, status report as still disputed but then disappeared from the next two reports (JX 162, JX 164, and DX 310), and two were listed as disputed on both the December 20, 2019, status report and the January 17, 2020, status report, but then omitted from the February 5, 2020, status report (JX 40 and DX 335).

A number of these exhibits were not admitted at the hearing, and the parties may have been under the impression that since the exhibit was not admitted, there is no need to consider or address confidentiality concerns for that exhibit. This is incorrect. When an exhibit is submitted but not admitted, it is not part of the record for the decision. But it remains part of the record in terms of the case file. This stands in contrast from an exhibit that is withdrawn by the submitting party—they are not part of the file since they were taken back by the party that originally had the exhibit marked. When this matter is appealed, the full case file will be transmitted, including the exhibits not admitted, since error may be claimed in an evidentiary determination. More importantly now, anything that is part of the case file, whether or not it is part of the evidentiary record for decision, is subject to disclosure under the Freedom of Information Act. The parties thus need to consider any confidentiality concerns that may apply to the exhibits submitted but not admitted.

Given the omission of 25 exhibits from the parties' earlier meet and confer process, or at least from the joint status reports, further meet and confers are necessary. The parties are ordered to meet and confer about these exhibits in an effort to reach agreement about whether or not the exhibits should be sealed, and if so, which portions should be sealed. The parties shall file a joint

status report within 14 days of this order memorializing their agreements and specifying any areas of disagreement. If the parties have reached agreement on proposed redactions for any exhibits, they shall include a thumb drive with their filing containing the redacted copies of the exhibits in question. If the parties reach agreement as to all of the exhibits in question, Oracle may concurrently file a supplement to its motion to seal that extends the motion to the agreed additional redactions. If the parties have not reached agreement as to all of the exhibits in question, further appropriate orders will follow concerning additional briefing.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge